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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1244

HAROLD FRANKLIN SMITH,
Petitioner,

VS.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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(a)

REFERENCE TO OFFICIAL REPORT

The opinion of the United States Court of Appeals for the Fifth Circuit in this case is reported in ..... F.2d. A copy of the official opinion of this case is appended hereto. (R 104)

(b)

GROUNDS OF JURISDICTION

The opinion sought to be reviewed, entitled Harold Franklin Smith v. United States of America, No. 22170, is dated February 1, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), and under and by virtue of Title 18, U.S.C. 3772, within the time provided for in Rule XI and Rule 22 (2) of the Rules of Practice and Procedure of the Supreme Court of the United States.

Jurisdiction of this Court is invoked because the United States Court of Appeals for the Fifth Circuit has decided important questions of federal law of gravity and importance in the administration of criminal justice which have not been, but should be settled by this Court. Said Court has misconstrued and applied decisions of this Court respecting the instructions which must be given to the jury, and has so far departed from the accepted and prescribed course of judicial proceedings so as to require the exercise of this Court's power of supervision.

(c)

QUESTION PRESENTED

1.

Did the District Court err in overruling the appellant's motion for a judgment of acquittal?

(d)

STATEMENT OF CASE

The indictment on which appellant was tried, convicted and sentenced charged in a single count that he possessed certain described property intended for use in violation of

the Internal Revenue Laws with respect to distilled spirits. Appelland and Walton C. Davis, Sr., were both named as defendants, however, only appellant was tried, as Davis disposed of his case by a plea of guilty.

The indictment was filed on October 5, 1964. The plea of not guilty was entered on October 9, 1964, and trial was had before a jury on October 27, 1964, resulting in a verdict of guilty. On October 29, 1964, appellant was sentenced to serve 12 months in the custody of the Attorney General of the United States. This appeal is from that judgment.

On the morning of September 16, 1964, Federal Agent William H. Maine, together with Agent Stratigos, located a non-registered distillery in Jackson County, Georgia. Their investigation at the site disclosed that the distillery was located in a barn. (R 30) They left the area and Maine returned with others at about 4:00 o'clock that afternoon. Maine stationed himself on a ridge in some trees at a vantage point where he could observe the barn, a nearby vacant house and the vicinity generally. While he was making observations from this point, he observed a truck parked in the driveway (near the barn), and he saw appellant walk up to the back of the truck, "working, putting in the tailgate, or standing up doing something to the tailgate of the truck." (R 31)

During the afternoon, at about 4:45 o'clock, he saw four men, including one attired as appellant and who it might be presumed was appellant, in the general area. At about 6:10 o'clock, a Dodge truck backed up to the barn. Appellant was on the truck. Maine saw appellant receiving from the barn and placing on the truck some "narrow little mattresses". He also saw appellant stacking some flues about 12 inches in diameter "that is used in the top of the boiler." The truck pulled away from the barn and a Ford

truck partially loaded with fruit jars was backed up to the barn. About 7:00 o'clock both trucks left. (R 33) Just before 8:00 o'clock two other trucks that had been at the distillery began pulling out of the driveway. As these trucks were leaving, Maine and the other officers made their presence known. The occupants of the trucks alighted and ran. In a few minutes one of the other officers located appellant in the woods. (R 34) The witness was familiar with all of the equipment that was seized down there on that particular day (R 36), and it is commonly used to make mash, ferment and make whiskey.

Agent Stratigos testified that on the evening of September 16, 1964, he and other agents drove past the driveway which leads to the residence of Walton Davis. As they approached, two trucks were coming out of the driveway. The two trucks stopped and men ran from the trucks into the bushes. The officers gave chase. One of them fell and broke his legs. After looking after the injured officers, securing an ambulance and doctor for the injured officer Stratigos went up the driveway about 50 yards to where one of the trucks was parked. He talked with another officer and then went into the bushes. About ten steps from the truck he found appellant lying face down in the bushes. Appellant appeared to be in some pain (R 16) and said that he hurt his shoulder. Upon being asked what he was doing there, appellant replied that he was fishing. (R 17) This occurred some thirty to forty minutes after the officers had observed men running from the trucks. (R 25)

The truck nearest the point where appellant was arrested contained approximately 300 cases of plastic jugs. The other truck was loaded with items relative to the operation of a distillery. These were described. (R 17-18)

A search of the Davis premises disclosed a number of items useful in manufacturing whiskey, including a Dodge pickup truck on which was loaded an upright boiler, a metal collar, wheat bran and a hydrometer. On the truck were four cardboard cartons containing clothing. The items of clothing in one of the boxes was dirty and had evidence of still mash on them. In one of the boxes the clothing was clean. One of the pairs of trousers had the name "Harold Smith" written in ink in the right front pocket. (R 19-21) It was evident from an examination of the barn and the contents thereof that a distillery had previously been installed therein. (R 22-23)

Mr. Frank G. Kendall (R 60-75), identified as a criminal investigator of the Alcohol and Tobacco Tax Unit of the Treasury Department, testified that he lifted a latent fingerprint from a one-half gallon glass jar containing nontaxpaid whiskey which was in the barn on the day of the violation. He identified this single print as being a print of the middle finger of appellant's right hand.

At the close of all of the evidence appellant made a motion for a judgment of acquittal. The motion was overruled. (R 98)

REASONS FOR GRANTING THE WRIT

In stating the evidence we have not detailed all of it, but have stated all pertinent facts which relate to the sufficiency of it to sustain the verdict and judgment. By cross-examination and by direct evidence offered by appellant, jury issues were raised as to the identification of appellant by Agent Maine and to the identification of his fingerprint by Agent Kendall. Since we recognize that these issues were properly addressed to the jury, we do not assert them here. However, we do insist that the evidence, considered

in the light of the verdict and most favorable to the Government, is not sufficient to measure up to the minimum standard required for conviction.

At best, the evidence shows that appellant actually "possessed" and handled some mattresses and some flues, the latter being an item which "is used in the top of the boiler." Attention is called to the fact that neither of these items is specified in the indictment as being property possessed by appellant with the requisite illegal intent.

If possession of the property specified in the indictment, or of any part of it, is to be attributed to appellant under the record, the Government must rely upon vicarious possession. It must contend that because he was at the site where the property was possessed by someone, was apparently interested in the moving of some of the property and was found near a truck loaded with some of the property, he must have possessed it. We urge that this is not sufficient, even when there is added the fact that a jar of whiskey at the abandoned still site contained one of his fingerprints and a pair of trousers found in a truck in one of the outbuildings had his name written in them.

As for the latter two items of evidence, at most, considering the charges contained in the indictment, they prove that he was present at the distillery. He was not charged with possessing the jar of nontaxpaid whiskey or with carrying on the business of a distiller, so we will not dwell upon this evidence. As for his presence at the site, we have Agent Maine's testimony. Thus, for present purposes, we must concede that he was there. The question is, did he have possession of the property described in the indictment?

This court has defined possession, as used in the statute relating to possession, custody and control of a dis-

tillery, in *McFarland* v. *United States*, 5 Cir., 273 F.2d 417, 419, as follows:

> "Possession of a still means that the defendant must have some dominion over the property, or some extrinsic circumstance that gives him the right to possess which includes control. It means having holding or detention of property in one's own power or command. Ownership, whether rightful or wrongful, is not necessary to establish possession. Possession may be defined as having personal charge of, or exercising the rights of management or control over the property in question. *Mere presence at the scene of an unlawful distillery with nothing more doesn't constitute possession.*" (Emphasis supplied)

By way of paraphrase, presence at the site of contraband with nothing more does not constitute possession of the contraband. While the ruling in *Bozza* v. *United States*, 330 U.S. 160, has been to some extent legislatively overruled. 26 U.S.C. 5601(b), *United States* v. *Gainey*, ... U.S. ....., 13 L.ed. 2d 658, it is still the law insofar as the present charge is concerned, that is, possession of property intended for unlawful use, that the evidence "must point directly to conduct within the narrow margins which the statute alone defines. One who neither engages in the conduct specifically prohibited, nor aids and abets it, does not violate the section which prohibits it." While the evidence might be construed to show that at some time or another appellant had handled a jar of whiskey at the distillery, and from the presence of a pair of trousers with his name in them, that he had at some time had something to do with the distillery or the operation of it, as stated by the Supreme Court in the *Bozza* case, it would be a very strained inference to say that he possessed or aided and abetted in the custody and possession of the property specified in the indictment. "Here again the statutes treat cus-

tody or possession as a wholly distinct offense. Yet there was no testimony that the (appellant) ever exercised, or aided the exercise of, any control over the (property)." Page 164, *Bozza* v. *United States, supra.*

It might be urged by the United States that because appellant was present at the site when at least two of the trucks were being loaded and was found near one of the trucks after they had been stopped, it might be inferred that he had possession of the material that was on the truck. The evidence is silent as to how many people were in the truck and it fails to show that appellant was the driver of it. The burden was upon the prosecution to prove all necessary and essential elements of the crime charged. In this situation, we think *McClain* v. *United States,* 5 Cir., 224 F.2d 522, applicable. At page 525 of the reporter, the court said:

> "As to Margie Mae McLain, we are convinced that this is not so. No concert of action was shown as to her, nor any act calculated to aid or abet the commission of the crime by Elijah, or by Peter Thorton, the other joint defendant. It may be inferred that she had knowledge that a crime was being committed (since one glass jug was uncovered and open to view, even to one riding in the front seat), but mere knowledge of the commission of the crime by another does not prove guilt. Nor does mere presence at the scene. Possession must be proved by some showing of dominion and control."

In summary presence at an unlawful distillery is sufficient to establish possession of the distillery, but mere presence at the scene of property intended for use in violating the law does not establish possession of such property. *McFarland* v. *United States, supra,* and *Vick* v. *United States,* 216 F.2d 229 (5th Circuit).

There is no evidence showing that appellant had any dominion or control over any of the property specified in the indictment. No concert of action with reference to that property is shown. It may be inferred that he had knowledge that a crime was being committed, but mere knowledge of the commission of a crime by another does not prove guilt, nor does presence at the scene. As stated in the *McClain case, supra*, "Possession must be proved by some showing of dominion and control".

CONCLUSION

For the reasons set out above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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JOHN N. CRUDUP

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ROBERT B. THOMPSON

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing petition of Harold Franklin Smith were this date deposited in the United States Post Office, Gainesville, Georgia, with air mail postage prepaid, addressed as follows: Solicitor General, Department of Justice, Washington '25, D. C.; Rufus D. McLean, Esq., Special Attorney, Department of Justice, Washington 25, D. C.; and E. Coleman Madsden, Esq., United States Attorney, Miami, Florida.

This .... day of April, 1966.

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JOHN N. CRUDUP

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ROBERT B. THOMPSON